

**BARAFF, KOERNER & OLENDER, P.C.**

ATTORNEYS AT LAW

THREE BETHESDA METRO CENTER, SUITE 640

**BETHESDA, MARYLAND 20814-5392**

DC (202) 686-3200

MD (301) 986-0500

FAX (301) 986-4844

ROBERT L. OLENDER\*  
JAMES A. KOERNER

April 2, 1997

DOCKET FILE COPY ORIGINAL

OF COUNSEL  
B. JAY BARAFF\*  
ROBERT BENNETT LUBIC\*

\*NOT ADMITTED IN MD

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APR 2 1997

Federal Communications Commission  
Office of Secretary

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W. Room 222  
Washington, D.C. 20554

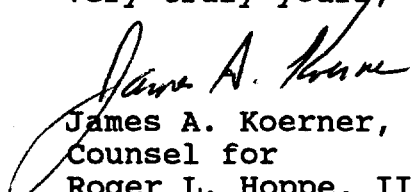
Re: MM Docket No. 95-135  
RM-8681

Dear Mr. Caton

On behalf of Roger L. Hoppe II, there are transmitted herewith an original and four copies of his Response to the "Motion for Leave to File Late Pleading and Opposition to Petition for Reconsideration" filed March 20, 1997, by Xavier University.

Should additional information be necessary in connection with this matter, please communicate with this office.

Very truly yours,

  
James A. Koerner,  
Counsel for  
Roger L. Hoppe, II

cc: Mr. Roger L. Hoppe, II

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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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**APR 2 1997**  
*Federal Communications Commission  
Office of Secretary*

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 95-135
Table of Allotments	)	RM - 8681
FM Broadcast Stations,	)	
(Honor, Michigan)	)	
To: Chief, Allocations Branch		
Policy and Rules Division		
Mass Media Bureau		

**RESPONSE TO  
MOTION FOR LEAVE TO FILE LATE PLEADING AND  
OPPOSITION TO PETITION FOR RECONSIDERATION**

Roger L. Hoppe, II, licensee of Station WZTU, Bear Lake, Michigan ("Hoppe" or "WZTU"), by his attorneys, hereby opposes the Motion to File Late Pleading, filed March 20, 1997, by Xavier University ("Xavier"). As demonstrated herein, the filing is not entitled to any consideration. Even if it is considered, the argument raised must be disregarded.

1. Xavier acknowledges that Hoppe's petition for reconsideration was placed on a public notice on December 3, 1996. By that time, Xavier was already an applicant for the Honor allotment, and, thus, should have inquired further into the matter. However, it did not. Now, some three and a half months later, Xavier simply claims that

it acted promptly once it received actual knowledge. There is no explanation of how it gained that knowledge.

2. The Commission does not issue public notices, such as that released December 3, 1996, simply to use paper. Nor does it do so to acknowledge to the petitioner that its filing has been received. Rather, it is to notify the public that a petition has been filed, and that responses may be filed. Xavier is a member of that public. If responses to petitions can be filed at will, the public notices issued by the Commission are meaningless. Administrative finality will be non-existent. Xavier's delay is not "excusable" as it claims. No excuse or reason has been given, except that it either did not know of, or appreciate the import of the filing, notwithstanding the public notice. In short, it was not paying attention. This, despite being an applicant for the very channel at issue.

3. Xavier cannot shift the blame to Hoppe by claiming that he never alerted Xavier to the fact of the filing. Hoppe did all that he was required to do. He filed a timely petition for reconsideration, and served the only other party in existence at the time, Jacqueline Bourgard. He had no requirement to alert applicants for the channel that there was a cloud over the allotment. The Commission's public notice served that purpose, and Xavier still ignored it.

4. Xavier claims that it will be prejudiced by the Commission's consideration of the petition since it has located and wishes to acquire a site. The Commission records reflect that there is a second applicant for this frequency, Jay Keuning. Thus, even if Hoppe were to withdraw his petition, the mutual exclusivity

between Xavier and Keuning would still exist, and would prevent the issuance of a construction permit. Of course, there may be an as yet undisclosed agreement between Xavier and Keuning.

5. Although the Commission does not normally consider such matters as zoning or site suitability prior to issuance of a construction permit, Xavier has made the acquisition of a site an issue in this matter. Accordingly, the Commission should not make the determination that a suitable site is available unless and until Xavier can demonstrate that it can, in fact, construct a tower at that location.

6. The thrust of Hoppe's petition for reconsideration was that the staff was incorrect in assigning the initial file number to his one-step application to upgrade WZTU. Xavier does not appear to dispute this error. In the petition for reconsideration, Hoppe seeks to have the application judged on the merits. Xavier, on the other hand, argues that Hoppe would lose on the merits. That is not the point. Hoppe, as every other timely filed litigant, is entitled to his "day in court".

7. Contrary to Xavier's suggestion, Hoppe's one-step application was not treated on its merits. The Report and Order specifically noted that it could not be considered as a counterproposal, because of the [erroneous] date of filing. The discussion of the allotment criteria was superfluous to the ground for the decision.

8. Having delayed more than three months after receiving constructive notice of the filing of the petition for reconsideration, Xavier cannot now be permitted to urge that the existence of a timely-filed petition is unduly delaying its own agenda, particularly when it is faced with a mutually-exclusive applicant. Hoppe is entitled to a

decision on his petition, and, if appropriate, an application for review, or even judicial review.

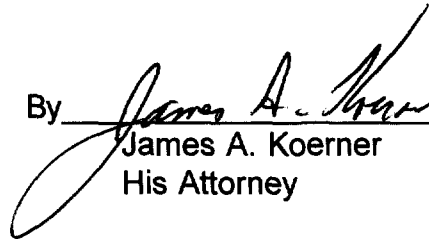
9. The grossly untimely Motion for Leave to File should be summarily denied.

Respectfully submitted,

ROGER L. HOPPE, II

Date: April 2, 1997

By

A handwritten signature in cursive script, appearing to read "James A. Koerner", is written over a horizontal line.

James A. Koerner  
His Attorney

BARAFF, KOERNER & OLENDER, P.C.  
Three Bethesda Metro Center  
Suite 640  
Bethesda, Maryland 20814  
(301) 986-0500

CERTIFICATE OF SERVICE

I, Molly M. Parezo, Office Manager, in the law firm of Baraff, Koerner & Olender, P.C., do hereby certify that copies of the foregoing Response to Motion for Leave to File Late Pleading and Opposition to Petition for Reconsideration was served this 2nd day of April, 1997, via first class United States mail, postage prepaid, upon the following:

Ernest T. Sanchez, Esq.  
2000 L Street, N.W.  
Suite 200  
Washington, D.C. 20036

Ms. Jacqueline F. Bourgard  
P.O. Box 365  
Mesick, Michigan 49668

Harry C. Martin, Esq.  
Fletcher, Heald & Hildreth, P.L.C.  
1300 North 17th Street  
11th Floor  
Rosslyn, Virginia 22209-3801

John A. Karuosos, Esq.  
Chief, Allocations Branch  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

  
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Molly M. Parezo